



IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case no: 3908/2021

In the matter between:

NEDBANK LIMITED

Applicant

and

PAVATI TRADING 146(PTY) LTD

First Respondent

HENRY SAMUEL HEWITT

Second Respondent

CORAM: RAMOS, AJ

HEARD ON: 03 MARCH 2022

DELIVERED ON: 14 MARCH 2022

JUDGMENT BY: RAMOS, AJ

INTRODUCTION

[1] This is an application for summary judgement in terms of Uniform Rule 32 on behalf of the Applicant. Advocate HJ Van der Merwe represents the Applicant and Adv Ferreira represents the respondent.

BACKGROUND

- [2] The claim arises out of a written overdraft facility entered into between the Applicant and the first and second Respondent, granting the Respondents an overdraft facility of R 1,100,000.00.

- [3] It is common cause that the facility has been exceeded by the Respondent's. Despite due, demand the Respondents, failed to pay the amounts due in terms of the facility agreement. As at 21 January 2021 the Respondents were indebted to the Applicant in an the amount of R 1 107 44.24

- [4] From the outset the Applicant contended that the debt fell within the ambit of the National Credit Act and duly complied by sending the Respondents notice in terms of Section 129 of the National Credit Act .The Applicant issued summon claiming cancellation of the overdraft facility agreement, payment of the outstanding debt with interest at the rate of 17, 50% and cost of the suit on a scale of attorney and own client.

- [5] The Respondents filed notice of intention to defend which was followed by a notice of bar, after which the defendant filed a plea.

- [6] The Applicant thereafter lodged the application for summary judgement. The defendant in turn opposed the application for summary judgement on the basis that there was no compliance with the provisions of Section 129¹ and further that the applicant actions were contrary to the spirit of the National Credit Act.

- [7] The defendant admits that the facility is overdrawn and that they are indebted to the plaintiff. The basis for defence is premised on the fact that the plaintiff did not comply with the aim and spirit of the National Credit Act, in that they

¹ National Credit Act 34 of 2005

failed to attempt to resolve the dispute and agree on a plan to allow the defendant to settle the debt.

[8] The dispute surrounding the non-compliance became irrelevant it appears. At the hearing, Advocate Van der Merwe informed the court that there is an issue in law that needed to be addressed. He informed the court that whilst preparing for the hearing the night before, he became aware that the National Credit Act, was not applicable to the debt claimed. The Plaintiff mistakenly issued notice to the Respondent in terms of Section 129 of the National Credit Act. The agreement between the parties in fact falls within the ambit of Section 4(1) b of National Credit Act because the debt falls within the definition of a large agreement as defined in Section 4 (1) b.

[9] Advocate Ferreira became aware of the Applicants submission less than an hour before the hearing and as such was unprepared to argue the point, which the plaintiff now raised. After an adjournment, she conceded that indeed the agreement between the parties is regarded as a large agreement in terms of Section 4(1) b.

NATIONAL CREDIT ACT 34 OF 2005

[10] Section 4. (1) Subject to sections 5 and 6, this Act applies to every credit agreement between parties dealing at arm's length and made within, or having an effect within, the Republic, except;

(a) a credit agreement in terms of which the consumer is:

(i) a juristic person whose asset value or annual turnover, together with the combined asset value or annual turnover of all related juristic persons, at the time the agreement is made, equals or exceeds the threshold value determined by the Minister in terms of section 7(1);

(ii) the state; or 10

(iii) an organ of state;

(b) a large agreement, as described in section 9(4), in terms of which the

consumer is a juristic person whose asset value or annual turnover is, at the time the agreement is made, below the threshold value determined by the Minister in terms of section 7(1); '

A credit agreement is a large agreement if it is-

- (a) a mortgage agreement; or
- (b) any other credit transaction except a pawn transaction or a credit guarantee, and the principal debt under that transaction or guarantee falls at or above the higher of the thresholds established in terms of section 7(l)(b).

[11] Having considered the provision of Section 4(1) b it is evident that the agreement is excluded the application of the National Credit Act and as such the Respondent's argument with regards to non-compliance with the NCA has no merit and that, that leg of the argument cannot be viewed as a bona fide defence.

ISSUES IN DISPUTE

[12] Having determined that the issues around the National Credit Act are no longer in dispute, the only remaining issue in dispute is whether the Respondent's in the remaining issues have disclosed a bona fide defence.

[13] The Respondent filed their plea and counter claim seeking the following relief:

- a) an order that the applicants provide the respondent's with a calculation of the :
 - i) the amount overdue
 - ii) the Applicants default administration charges
 - iii) the Applicants reasonable cost of enforcing the agreement to date thereof
- b) the Respondent makes immediate payment of the aforesaid amounts upon receipt of the calculation.

c) Reinstatement of the credit facility

- [14] Advocate Ferreira argues that the Applicants claim has to be pleaded with sufficient detail in order to enable the Respondent to reply. The Respondent is not able to confirm or deny the amount of their indebtedness to the Applicant due their systems being hacked and because of the cancellation of the facility; he no longer has access to the facility to check the outstanding balances. She argues that the Applicant can therefore not rely on the claim as being one, which fall within the definition of a liquidated claim.
- [15] In reply, Advocate Van der Merwe argues that it is sufficient for the Applicant to provide a certificate of balance which it has done. He argues that the Respondent in turn fails to state or produce proof of the extent of the payments that were made into the facility after it was cancelled.
- [16] This issue was resolved after the matter stood down and the Applicant provided a most recent certificate of balance setting out clearly the amount owing by the Respondents. As at 03 March 2022 the certificate reflects the outstanding amount owing of R 1 350 448.50
- [17] This court is thus left to determine whether the Respondent has demonstrated that he has a valid bona fide defence. Summary judgment therefore cannot be granted where it is clear that the defendant demonstrates a triable defence. The court should however remain vigilant of the rights of the Applicant who is entitled to bring the application for summary judgment procedure to obtain a speedy judgment against the defendant in cases where the defendant has no valid defence to the claim. The purpose being to avoid the unnecessary cost and effort of running a protracted trial where it is clear that the defendant's only intention is to frustrate the process and delay the inevitable ruling against him.

THE LAW

[18] **Rule 32² provides that:**

(1) Where the defendant has delivered notice of intention to defend, the plaintiff may apply to court for summary judgment on each of such claims in the summons as is only –

- (a) on a liquid document;
- (b) for a liquidated amount in money;
- (c) for delivery of specified movable property; or
- (d) for ejectment;

together with any claim for interest and costs.

[19] It is important to note substantial and material amendments in respect of Rule 32 came in to operation on the 1st of July 2019. In terms of the rule in its amended form:

- (a) the plaintiff may only apply for summary judgment after the defendant has delivered a plea (sub rule 1);
- (b) the plaintiff must, in the affidavit in support of summary judgment, verify the cause of action and the amount, if any, claimed, and identify any point of law relied upon and the facts upon which the plaintiff's claim is based, and explain briefly why the defence as pleaded does not raise any issue for trial (sub rule (2)(b));
- (c) the defendant may, in order to avoid summary judgment, give security to the satisfaction of the court, and no longer to the satisfaction of the registrar, for any judgment including costs which may be given (sub rule (3)(a)

[20] Summary judgment has always been regarded as a stringent remedy in that it permits a judgment to be granted in favour of a plaintiff against a defendant without a trial.³ Hence, it is trite that summary judgment should only be

² Uniform Rules of Court , Supreme Court Act 59 of 1959

³ *Absa Bank Ltd v Le Roux 2014 (1) SA 475 (CC) at 476H-477J and 478I-J; Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture 2009 (5) SA 1 (SCA) at 11G-12D*

resorted to where the plaintiff can establish his or her claim clearly and the defendant fails, as he or she is required to do, to set out a *bona fide* defence.⁴ Our courts have been warned to guard against injustice to the defendant who is called upon, at short notice and without the benefit of further particulars, discovery or cross-examination, to satisfy a court that such a defendant has a *bona fide* defence.⁵ On the one hand the remedy of summary judgment should be available to a plaintiff whose right to relief is being frustrated by a defendant who does not have a defence. However, on the other hand, our courts have always been reluctant to deprive a defendant of his right to defend an action and proceed to trial, except where there is a clear case.⁶

DOES THE RESPONDENTS DISCLOSE A BONA FIDE DEFENCE

[21] As is clear from the foregoing, there remains very little in dispute after it was agreed that the NCA is no longer applicable. The Respondent argued that the Applicant should amend their particulars of claim to rectify his fact. However, the Applicant raised compelling argument that the material essence of the claim remains the same. Whether or not the portion related to the NCA is immaterial. I am convinced by hi argument and am in full agreement.

[22] The Respondent's do not dispute their indebtedness. Notwithstanding the detail provided in the certificate of balance, the Respondent in his counter claim requests a detailed statement of account purportedly because he avers that subsequent to the cancellation of the facility, additional payments might have been made into the account. He provides no details or documentary proof of the alleged amounts of these payments.

[23] The Applicant once again correctly argues that the certificate of balance is regarded as sufficient proof of the amount owing as at the time that the

⁴ *SA Bank of Athens Ltd v Van Zyl* 2005 (5) SA 93 (SCA) at 102E

⁵ *Subrule (3)(b); Breitenbach v Fiat SA (Edms) Bpk* 1976 (2) SA 226 (T) at 227D-H; *Marsh v Standard Bank of SA Ltd* 2000 (4) SA 947 (W) at 950A-B.

⁶ *Standard Bank of SA Ltd v Naude* 2009 (4) SA 669 at 672C-676D

summons was issued and as such is under no obligation to provide updated information in absence of any tangible proof provided by the Respondent. The averment is unsubstantiated by any documentary proof, receipts or statements.

[24] The rules make no provision for submission of supplementary affidavits. However, summary judgment is sui generis. It has always been (and remains to this day, despite amendment) a self-contained procedure with its own well-established principles. As such, it is not bound by those principles governing other procedures as contained, inter alia, in the Uniform Rules of Court. It is for this reason that great caution should be exercised when seeking guidance, to one degree or another, from the provisions of other rules when interpreting Rule 32. Therefore, having heard the parties and in limiting the issues in dispute the court ordered that the Applicant make available to the most recent certificate of balance which was duly provided by the applicant.

[25] The Respondents uncertainty with regards to the outstanding balance was the basis of the Respondent's argument and counterclaim. Once the information became available there, remains nothing further in dispute in my view. The Respondent at all times acknowledged their indebtedness to the Applicant. The amount is a liquidated amount and in terms of the contractual agreement between the parties the applicant is under no obligation to reinstate the facility.

FINDINGS

[26] That being said the court could not find that the Respondent has demonstrated that he has valid bona fide defence in law, which would justify the court dismissing the application for summary judgement. Once all is said and done it cannot be argued that the Respondent has proved that there are issues that need ventilating in a trial proceedings. The summary judgment procedure does provide for an order compelling the Applicant to enter into

negotiation proceedings with the Respondent however helpful it would have been to the Respondent in this matter. The Applicant is entitled assert their rights as afforded in the Rule 32.

ORDER

[27] **Accordingly, I make the following order:**

1. Confirmation of cancellation of the overdraft facility agreement
2. Payment in the sum of R 1 350 448.50
3. Interest on the amount referred to in paragraph 2 above at the rate of 17, 50% per annum, compounded daily and capitalized monthly from 22 January 2021 to date of final payment, both days inclusive
4. Cost of the suit on an attorney and own client scale

A RAMOS, AJ

APPEARANCES

On behalf of the Applicant

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On behalf of the Respondent

**Advocate Ferreira
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